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Supreme Court of the United States

OCTOBER TERM, 1954.

No. 693.

SOPHIE D. COHEN and MEYER KRAUSHAAR, Executors of the Estate of William W. Cohen, Deceased,

Petitioners,

BESSIE G. GLASS, Executrix of the Estate of Joseph Glass, Deceased, JOSEPH P. TUMULTY, JR., Executor of the Estate of Joseph P. Tumulty, Deceased, and MIDDLE STATES PETROLEUM CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT MIDDLE STATES PETROLEUM CORPORATION IN OPPOSITION.

RALPH MONTGOMERY ARKUSH,
Counsel for Respondent Middle States Petroleum Corporation.

Dated: April 21, 1955.

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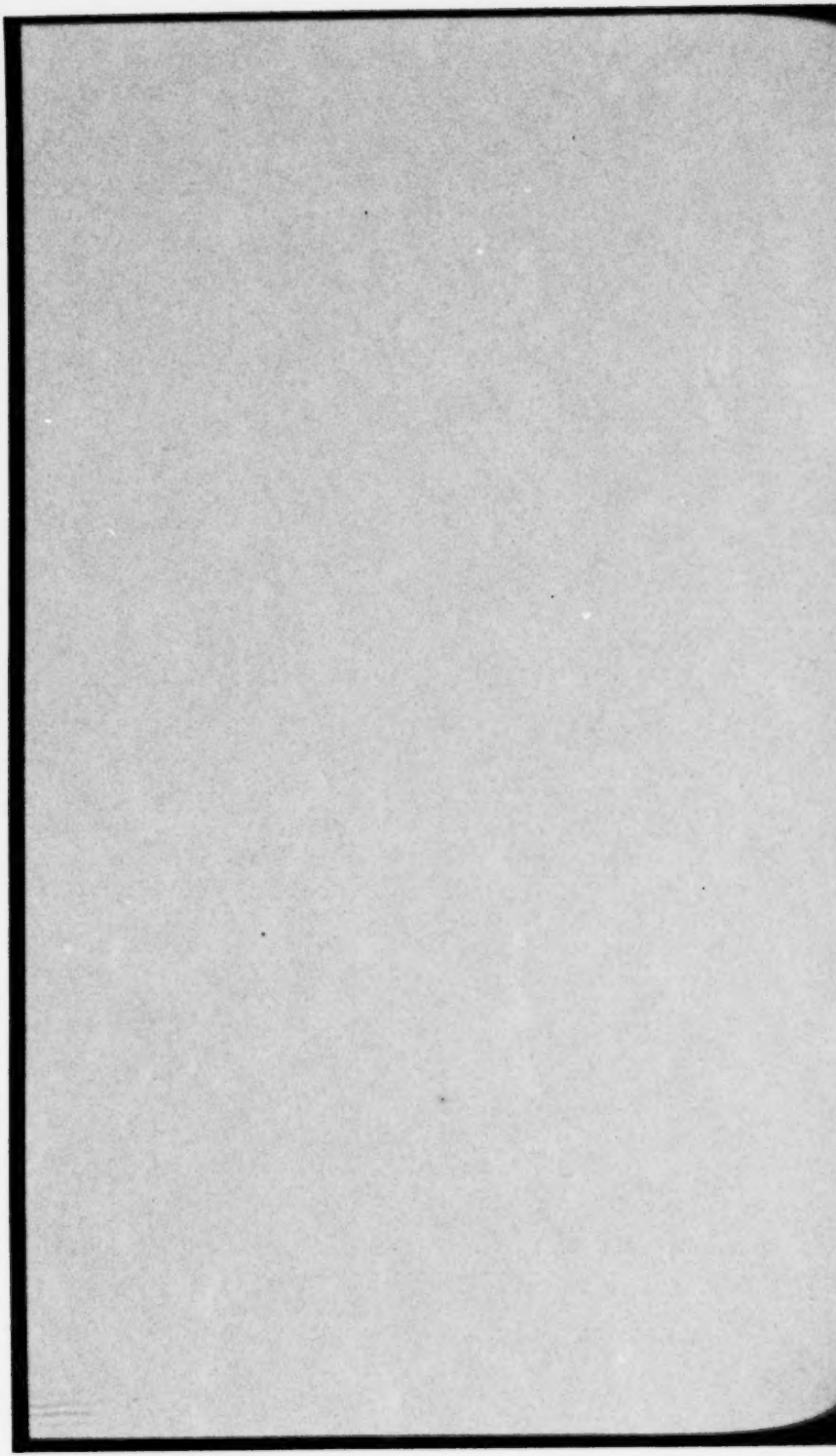

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[Numerals preceded by "ff" refer to numbered findings of fact of district court (124 F. Supp. 730-775). Numerals followed by "a" or preceded by "ja" refer, respectively, to pages of appellants' appendix or appellees' joint appendix in court of appeals.]

Opinions Below.

The district court's opinion, which includes findings of fact, conclusions of law and a memorandum of decision, is reported at 124 F. Supp. 728. The opinions of the court

of appeals on the merits of petitioners' appeal, on the petition for rehearing and on appellate costs (Pet. 2017-2133) are not reported.

Jurisdiction.

The judgment of the court of appeals was entered on January 11, 1955. A petition for rehearing was denied on February 21, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Question Presented.

Circumstances: A plan for reorganization of a corporation, obligor on an issue of bonds, is effected through sales of its assets made by a special master pursuant to decrees entered by a federal district court in suits in equity based on diversity of citizenship. The court confirms the sales and directs the transfer of the assets by the special master to a new company which becomes a party to the suits. No appeals are taken from the decrees of sale or confirmation. The new company acquires the assets by bills of sale from the special master and issues its securities as provided in the plan to the depositing bondholders. Non-depositors are entitled to receive from the new company the cash distributive values of their bonds as fixed by the court on the basis of the prices paid at the sales and confirmed. Fifteen years after completion of the reorganization the holders of non-deposited bonds, alleging that the reorganization was unfair under the Boyd Rule (*Northern Pacific Ry. Co.* v. *Boyd*, 228 U. S. 482), assert in one of the diversity suits a claim against the new company for the difference between the cash distributive values of their bonds, already collected, and the full amount which became due on their bonds for principal and interest.

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Question: Whether the statute of limitations of the state in which the district court is located is a bar to the claim of the non-depositing bondholders against the new company?

[NOTE: The above is a rephrasing of Question No. 6 stated in the petition (Pet. 4). Questions Nos. 1-4 (Pet. 3-4) do not concern this respondent, Middle States Petroleum Corporation (MSP). Question No. 5 refers to the reorganized company, i. e. MSP, as having "accepted the transfer of assets through the challenged judicial sales under the circumstances disclosed by the facts in the record" (Pet. 4). Rule 23(1)(c) requires the petition to contain the "questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail." A sweeping reference to "the circumstances disclosed by the facts in the record" falls short of a compliance with the rule. Question No. 5 should be disregarded as too vague and general to apprise the Court or opposing counsel of the particular points to be argued (*cf. Seaboard Air Line Railway* v. *Watson,* 287 U. S. 86, 91).* Question No. 7, concerning the award of appellate costs, does not merit discussion.]

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* Even were Question No. 5 treated as adequate to raise the point of MSP's liability on the merits, it would present no ground for certiorari, since

(a) the two courts below concurred in the findings that the charges against MSP of fraud and conspiracy were not proved (124 F. Supp. 779; Pet. 2021, 2060)—findings of fact which this Court will not review in the absence of a very obvious and exceptional showing of error (Fed. Rules Civ. Proc. rule 52[a], 28 U. S. C. A.; *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.,* 336 U. S. 271, 275, and cases cited);

(b) the charge of unfairness of the plan under the Boyd Rule, even if sustained, would not impose liability upon MSP, as grantee in a fraudulent conveyance, there being some "fair consideration" (*cf.* Glenn on Fraudulent Conveyances, rev. ed., §§295, 6) and no actual fraudulent intent in the grantor (whether special master, UOP, UOP receivers or reorganization committee)—facts as to which the two courts below concurred (ff. 258-9; Pet. 2054-2060; N. Y. Debtor and Creditor Law, §§273, 276).

Statute Involved.

The 10-year statute of limitations of New York (Civil Practice Act, §53) which is the statutory provision relied on by MSP, is appended, with other statutory provisions, to the petition (Pet. 2207).

Statement.

A plan for the reorganization of Middle States Oil Corporation (MSO) and its subsidiaries or associates, United Oil Producers Corporation (UOP), Oil Lease Development Company (OLD) and Imperial Oil Corporation (Imperial), was prepared by a reorganization committee appointed by representatives of various classes of securities and was adopted and promulgated under date of July 29, 1929 (ff. 36-39; plan: r. ex. 94, ja 1566-1596). Among the publicly held securities dealt with in the plan were $2,044,100 principal amount of UOP bonds and $389,800 principal amount of OLD bonds, the latter being secured by a like principal amount of UOP bonds (ff. 181, 232, 239). The UOP bonds were secured by the pledge of certain shares of stock and were guaranteed by Imperial (ja 1581 n.; 1603).

The necessary steps were taken by diversity suits in the district court to foreclose the indentures securing the UOP and OLD bonds and to obtain a decree for the sale of the free assets of those companies and Imperial in a general creditors suit in the district court (Phelan Suit), based on diversity of citizenship, to which those companies were parties defendant (ff. 40; final decrees: r. exs. 103, 109, 115, ja 1600-1628, 1653-4, 1659-1697). The same special master was named by the district court to conduct all of the sales (ja 1625, 1692). All of the assets of the four companies were sold on December 16, 1929, to bidders act-

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ing for the reorganization committee (ff. 43, 44; ja 1736-8, 1775-7). The sales were confirmed by the district court on December 24, 1929 (orders confirming sales: r. exs. 129, 139, ja 1743, 1775). Pursuant to those orders the special master on January 2, 1930, assigned and transferred the assets to MSP as the new company provided for in the plan, a copy of which had been annexed to the petitions of the bidders for confirmation of the sales (ja 1738, 1742; 1776-7). The preparation, adoption and promulgation of the plan, the entry of the decrees of sale and confirmation, the sales and the execution and delivery of the bills of sale by the special master to MSP, all took place in the State of New York.

The holders of UOP and OLD bonds who deposited under the plan received an equal principal amount of bonds of MSP and class A stock of MSP for unpaid interest (ff. 225). Bondholders who did not deposit before the final date fixed by the reorganization committee were entitled to receive in cash the distributive values which, in the case of the UOP bonds, were fixed by the court at $698.55 per $1,000 principal amount of bonds (ff. 247). The cash distributive values were payable at the latest shortly after July 25, 1933 (ff. 270).

Petitioners' testator collected the distributive values of $32,200 principal amount of undeposited UOP bonds* on January 13, 1935 (f. 272). In addition to the $32,200 of bonds in the possession of petitioners there are only $19,100 of UOP bonds which were not deposited under the

* At the trial in the district court MSP contended that of these bonds in the possession of petitioners $24,700 belonged in fact to one of the corporations in the system and that petitioners were liable to MSP for the fraud of their testator in collecting the distributive values. The judgment of the district court dismissing the cross-claim of MSP against petitioners for the alleged fraud was reversed by the court of appeals (210 F. 2d 360, 365-7). An additional trial of the cross-claim has been had in the district court, but no decision has yet been rendered.

plan or otherwise acquired by MSP; of these $6,000 have not been presented for payment of the distributive values (ff. 249).

On April 5, 1945, petitioners asserted in the Phelan Suit a claim against MSP for the amount of principal and interest unpaid on the $32,200 of UOP bonds "charging fraud in the acquisition of * * * the assets of UOP" (Pet. 7). The charges against MSP were amended and supplemented at the opening of the trial in the district court. MSP filed a cross answer which, among others, set up the defense of the 10-year statute of limitations of New York (cross answer of MSP, p. 13: not printed; see excerpt below*).

Petitioners' claim against MSP, as asserted in the district court, was based on charges of actual fraud and conspiracy and unfairness of the plan under the Boyd Rule. The district court found in favor of MSP on all of the charges of fraud and conspiracy and, so far as UOP bondholders were concerned, unfairness under the Boyd Rule (judgment: 9, 11-12a). On the defense of limitations the district court said (124 F. Supp. 805):

> "On the United [UOP] accounting, in view of the findings herein, we do not reach the question of whether any claim against M. S. P. is barred by the statute of limitations."

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* Sixteenth Defense.

38. The right or rights of action asserted by the objectants [including petitioners] against MSP did not accrue within ten years next before the assertion thereof in this cause. The injunctive provisions of the final decrees in the foreclosure suits hereinabove mentioned and in this cause did not prevent the objectants from applying in said causes for leave to commence actions against MSP upon the alleged cause or causes of action asserted against MSP herein. The running of the ten year statute of limitations, therefore, was not tolled within the meaning and intent of §24 of the Civil Practice Act of New York.

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The court of appeals, however, *unanimously* sustained the defense of limitations in favor of MSP (Pet. 2060-2; 2123; 2133). Both of the opinions in the court of appeals treated the claim against MSP as one based on the Boyd Rule alone (Pet. 2054-2062; 2123), thus indicating that the charges against MSP of fraud and conspiracy were not worthy of discussion.

The basis for federal jurisdiction of the case at bar in the court of first instance was, as above stated, diversity of citizenship.

ARGUMENT.

I.

The decision below, unanimously sustaining the defense of limitations in favor of MSP, is correct.

In a diversity suit on the equity side the court applies the applicable state statute of limitations to a state-created right (*Guaranty Trust Co.* v. *York*, 326 U. S. 99).

Here the claim is based on an alleged violation of the Boyd Rule. If MSP were liable it would be as the grantee in a fraudulent conveyance (1 Glenn on Fraudulent Conveyances, rev. ed., §224, p. 389). Local law determines whether a transaction is fraudulent as to creditors (*ibid*, §62a). The law of New York on fraudulent conveyances is contained in article 10 of the Debtor and Creditor Law, §§270, *et seq.* (identical with Uniform Fraudulent Conveyance Act, 9 Uniform Laws Ann.). When constructive, not actual, fraud is charged against the grantee in an alleged fraudulent conveyance, the applicable statute is N. Y. Civ. Pr. Act, §53 (Pet. 2207; *Buttles* v. *Smith*, 1939, 281 N. Y.

226, 236, *cf. State of Rio de Janeiro* v. *E. H. Rollins & Sons*, 1949, 299 N. Y. 363, 367).

Petitioners' suggestion (Pet. 15) that a claim against MSP "falls into the purview of federal law rather than state created rights, as in *Holmberg* v. *Armbrecht*, 327 U. S. 392" is without substance. The case cited was a suit in equity to enforce liability of shareholders in a joint stock land bank imposed by the Federal Farm Loan Act (12 U. S. C. §812). The case unquestionably concerned "a federally-created right" (327 U. S. 395). As pointed out in Judge Learned Hand's opinion in the case at bar, although the actual deed to MSP was made by a special master of the court under its direction, petitioners may not take the position that the transfer was illegal under federal law, for the court affirmed it and they did not appeal: petitioners must argue "that the situation is as if 'U. O. P.' had made a conveyance in the course of a reorganization out of court, in which event the Statute of Limitations of New York would apply" (Pet. 2061).

Petitioners also question (Pet. 15) "whether the New York statute has been correctly applied since the transfer to the reorganized company was accompanied by concealment of the facts amounting to actual fraud tolling the statute until discovery" and cite §48(5) of the Civil Practice Act (Pet. 2207). The courts of New York confine the application of §48(5) to cases where are present the classic elements of a common law action for deceit: misrepresentation, *scienter*, reliance and damage (*Laird* v. *United Shipyards*, 1947, 2 Cir., 163 F. 2d 12, 15; *American Cities Power & Light Corp.* v. *Williams*, 1947, Sp. T. N. Y. Co., 189 Misc. 829, 835; *Finn* v. *Empire Trust Co.*, 1950, S.D.N.Y., 121 F. Supp. 309, 316; *cf. Reno* v. *Bull*, 1919, 226 N. Y. 546, 550). On this factual issue MSP was exonerated by both of the courts below: this Court will not, therefore, review the facts.

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The contention that §48(5), rather than §53, of the New York Civil Practice Act should have been applied in a diversity suit is not ground for certiorari (*cf. Laird* v. *United Shipyards,* 332 U. S. 842).

II.

There is no conflict of decisions.

Petitioners suggest no conflict with federal or state decisions on the question of the applicability of the state statute of limitations to a state-created right. There is none.

III.

There is no important question of federal law.

The question of the applicability of state statutes of limitations in diversity suits in equity to rights based on state law was definitively settled in *Guaranty Trust Co.* v. *York, supra.* There is no need of the question being reviewed again.

IV.

The issuance of the writ is not in the public interest.

Other than the bonds in the possession of MSP or petitioners there are only $19,100 of UOP bonds outstanding of which $6,000 are probably lost (ff. 249). As was said by the court of appeals (Pet. 2133):

> "• • • we are not disposed to regard the action as one brought in the public interest • • • only the U. O. P. bondholders had any interest in the outcome and a very small fraction of them."

On the other hand, MSP is a publicly owned corporation. At the time of the trial it had 16,000 stockholders (ff. 224). It is to their interest that this long drawn out litigation be terminated at the earliest possible moment.

It also is to be noted that since the enactment of the corporate reorganization sections of the Bankruptcy Act, reorganizations through judicial sales have become the exception.

Conclusion.

There being no special and important reasons for the issuance of the writ as against this respondent, the petition should be denied as to Questions Nos. 5, 6 and 7 stated in the petition.

Respectfully submitted,

RALPH MONTGOMERY ARKUSH,
Counsel for Respondent Middle States Petroleum Corporation.

Dated: April 25, 1955.

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